2771

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT.

SOUTHERN OREGON COMPANY,
Defendant and Appellant.

v.

UNITED STATES OF AMERICA,
Complainant and Appellee.

COMPLAINANT'S BRIEF OF THE LAW.

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Special Assistant to the Attorney General.

HOGAN LINOTYPING CO., OMAHA

OUTLINE OF ARGUMENT.

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Explanatory Note.

This brief is divided into two chief parts—(a) the propositions by the Government; (b) the affirmative defenses of the defendant. Pages I, II and III, *ante,* contain an outline of the argument. In the back of the brief is a list of decisions and other authorities cited. For the testimony we refer to appellee's brief of the facts, and indicate it by the letters "B. F." in parenthesis.

PART I.

GOVERNMENT'S AFFIRMATIVE PROPOSITIONS. ARGUMENT.

I.

PERTINENT RULES OF CONSTRUCTION.

(1) An act of Congress making a grant is more than a mere conveyance. It is a law as well. (Oregon & California R. R. Co., et al., v. United States, 35 S. C. R., 920-2. Missouri, etc., R. R. Co. v. Kansas Pacific, 97 U. S., 491-497).

(2) In construing public grants, such as the one under consideration, all doubts must be resolved in favor of the grantor (United States v. Oregon & California R. R. Co., et al., 186 Fed., 861-893; Winona v. Barney, 113 U. S., 618, 625; Oates v. National Bank, 100 U. S., 239, 244).

(3) There is a presumption against a construction which would render a statute ineffective or inefficient, or which would cause grave public injury or even inconvenience (Bird v. United States, 187 U. S., 118, 124).

(4) The language of the act must be permitted to control, unless the plain meaning thereof leads to results so absurd as to force the conviction that Con-

gress could not have intended them (United States v. Oregon & California R. R. Co., et al., 186 Fed., 861-892; Kohlsaat v. Murphy, 96 U. S. 153, 160).

(5) Rules of statutory construction are employed to resolve, but never to create, doubts (Hamilton v. Rathbone, 175 U. S., 414; McCluskey v. Cromwell, 11 N. Y., 601; Lewis' Sutherland Statutory Construction, Vol. 2, pp. 698-702, and cases cited).

(6) When searching for the meaning of an act, the policy of Congress at the time it was passed may be considered.

At the time when the granting act in this action was passed, it was the fixed policy of Congress not to make any grants of the public domain without requiring the grantee to sell the land in quantities not to exceed 160 acres to one person and at a price not to exceed $2.50 per acre. This policy was expressed in what is known as the Julian Amendment.

None of the grants in aid of internal improvements prior to the passage of this act, March 3, 1869, contained any provision restricting the sale of the land either as to character of purchaser, quantity, or price, except that, prior to 1850, most of the grants provided that the lands should not be sold for less than double the minimum Government price, the only abuse of the grants then anticipated by Congress being the squandering of the lands at insignificant prices. The manner in which the Pacific railroad grants had been handled, the scandal attending the matter, and the public indignation thereby aroused, caused a general discussion of

land grants in Congress before and at the time the Act in suit was passed. The Julian Amendment came out of this discussion, and crystalized the policy of Congress. This policy may be considered in ascertaining the meaning of the Act now before the court, if there should be any doubt about it (United States v. Oregon & California R. R. Co., et al., 186 Fed., 861, 894; United States v. Union Pacific, 91 U. S., 72, 79; Platt v. Union Pacific, 99 U. S., 48, 64; Smith v. Townsend, 148 U. S., 490, 494; Mobile Ohio R. R. Co. v. Tennessee, 153 U. S., 486, 502).

II.

THE RESTRICTIVE PROVISO IS ENFORCIBLE.

The chief controversy in this case turns upon the meaning of the following proviso in the granting act:

> *Provided, further,* That the grant of lands hereby made shall be *upon* the *condition* that the lands shall be sold to any one person only in quantities not greater than one quarter section, and for a price not exceeding two dollars and fifty cents per acre (B. F. 2).

For convenience, we speak of this throughout the brief as the "restrictive proviso."

Defendants allege in the answer that this proviso "is merely a non-enforcible direction or request as to the future disposition of the lands" (B. F. 24).

This is in effect the contention that was made by

the defendants in the *Oregon & California* case, and which was denied by the Supreme Court. The restrictive provisos in that case are as follows (these are two, substantially alike, however):

> *And provided further,* That the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter secion to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.

The last requires the lands to be sold to "actual settlers," the first does not. In other respects they are in effect the same.

Speaking of the provisos in the *Oregon & California* case the Supreme Court said: "They are covenants and enforceable" (p. 920).

The appellant asserts that there is a distinction between the provisos in that case and the one in the case at bar—that "The settlement of the country and not the building of the road was the paramount purpose of the grant" in the Oregon & California case, but that "no such claim can be made here" (Brief p. 16). The Supreme Court did not so hold. What it did say on that point is this:

> We shall be led into error if we conclude that because the railroad is attained it was from the beginning an assured success, and that it was a *secondary* and not a *primary* purpose of the acts of congress. * * * But such success had not been achieved when the grant of 1866 was made, nor in full measure when the acts of 1869 and 1870 were passed, and it may be conceded that they were

> intended to continue and complete such national purpose and that it was of the first consideration, but the *secondary* purpose was regarded and provided for in the provisos under review (p 918. Italics ours).

In other words, the building of the road was the primary purpose, and the populating of the country only secondary.

The opinion in other places makes it clear that the proviso is free from ambiguity and easily understood. It says in the opening sentence:

> A direct and simple description of the case would seem to be that it presents for judgment a few provisions in two acts of Congress which neither of themselves nor from the context demand much effort of interpretation or construction (p. 916).

Again, the judgment of the court is to be:

> Determined by the *simple* words of the acts of Congress, not only regarded as grants but as laws, and accepted as both; granting rights, but imposing obligations. Rights quite definite, obligations as much so (p. 925. Italics ours).

Speaking of the duty of the court with respect to the provisos it observes:

> We can only enforce the provisos as written, not relieve from them.

And of the duty of the defendants to obey them it remarked that—

> Whatever the difficulties of performance, relief could have been applied for, and it might have been secured through an appeal to congress. Certainly

> evasion of the laws or the defiance of them should not have been resorted to (p. 925).

In response to the contention that the character of the lands excused the defendants from obedience to the provisos, the court said:

> The character of the lands furnished no excuse. It might have justified non-action, but it did not justify antagonistic action (p. 922).

Again, speaking upon the same subject:

> If but little of the land was arable, most of it covered by timber and valuable only for timber and not fit for the acquisition of homes, if a great deal of it was nothing but a wilderness of mountain and rock and forest * * * if the grants were not as valuable for sale or credit as they were supposed to have been and difficulties beset both uses,—the remedy was obvious. Granting the obstacles and infirmities, they were but promptings and reasons for an appeal to Congress to relax the law. They were neither cause nor justification for violating it (p. 920).

All this is pertinent here and answers every contention made by the appellant on the assumption that the land was not fit for the acquisition of homes, and therefore that the grantee was justified in disregarding the plain mandate of the law.

More need not be said. The decision of the Supreme Court puts it beyond doubt that the restrictive proviso means just what it says, and that it was the duty of the grantee to obey it.

Why the proviso does not contain the phrase "actual

settlers'' is explained by the following proceedings in Congress when the bill was pending:

The bill for the wagon road grant was introduced in the Senate. When it passed that body it did not have the restrictive proviso in any form.

In the House, Mr. Julian offered this amendment:

> *Provided,* That the grant of lands hereby made shall be *upon* the *condition* that the lands shall be sold *to actual settlers only,* in quantities not greater than one quarter section, and for a price not exceeding $2.50 per acre.

He then stated that the bill had not been considered in committee, but if the proposed amendment were accepted, he would not insist upon a reference of the bill to the Public Lands Committee.

Mr. Mallory, Representative from Oregon, who had charge of the measure, made a statement in favor of the bill. A motion to refer the bill to the Public Lands Committee was made and defeated. The bill then came before the House on the question of Mr. Julian's amendment. He modified the amendment by adding the words ''to each person'' after the words ''quarter section,'' making the clause read ''in quantities not greater than one quarter section to each person.'' *The amendment was then agreed to without objection, and in that form the bill was passed,* and the clerk of the House was ordered to report the action to the Senate and request its concurrence in the amendment.

Being the next to the last day of the session, the

matter was immediately communicated to the Senate without the usual precautions. It came up before that body within a short time on the same day. But in some manner the terms of the amendment were changed in the meantime, and it was reported to, and read in, the Senate as follows:

> *Provided further,* That the grant of lands hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one quarter section and for a price not exceeding $2.50 an acre.

The restriction as to actual settlers had been eliminated. The change was not discovered, and in the latter form the amendment was concurred in by the Senate, and in that form the bill was enrolled, signed by the President of the Senate and Speaker of the House, and approved by the President of the United States the next day, March 3, 1869.

Whether this change occurred through inadvertence or through improper influences can only be conjectured. The haste with which legislative matters are handled on the last two days of a session made either possible. But there is no doubt of the accuracy of the foregoing facts (Congressional Globe, third session Fortieth Congress, pp. 1798-1820).

The proceedings show that the amendment proposed by Mr. Julian was not offered because of any special policy peculiar to that grant, but in fulfillment of the general policy as to all grants. This is borne out by the proceedings concerning another grant on the same day, and within a few minutes after the proceed-

ings relating to the Coos Bay grant, when it was expressly stated that these amendments were offered pursuant to a general policy adopted by both Houses of Congress.

Upon the same day, March 2, 1869, Senate bill No. 679 came before the House for consideration. The object of this bill was to extend the time for the construction of a wagon road under the act of July 2, 1864 (13 Stat., 355).

Pursuant to the policy that had been adopted, the moment this bill came before the House, Mr. Julian moved the following amendment:

> *Provided,* That the grant of lands hereby renewed and continued shall be upon the condition that the lands shall be sold to actual settlers only, in quantities not greater than a quarter section and for prices not exceeding $2.50 per acre.

In support of his amendment, Mr. Julian said:

> Mr. Speaker, the amendment which has been read by the clerk is a *provision which ought to be applied to every future grant of land and to every dead grant that seeks a revival at our hands.* * * * The adoption of the amendment will not defeat the passage of the bill, for *the Senate, like the House, has repeatedly approved of the very condition prescribed in the amendment* (Cong. Globe, 3d Sess. 40th Cong., p. 1821).

III.

THE WAGON ROAD COMPANY WAS SUBSTITUTED FOR THE STATE.

The Government claims that Oregon, by the act of October 22, 1870, substituted the wagon road company for itself as grantee under the grant. This, it says, is clearly shown by the circumstances surrounding the transaction. The legislative act recites verbatim the congressional granting act, and then provides in Section 1:

> That there is hereby granted to the Coos Bay Wagon Road Company, all lands, rights of way, privileges, and immunities heretofore granted or pledged to this State by the Act of Congress in this act heretofore recited, for the purpose of aiding said company in constructing the road mentioned and described, in said Act of Congress, upon the *conditions and limitations therein prescribed* (B. F. 5) (Italics ours).

(a) The Substitution Authorized.

The state had a right to pass such an act, for in Section 6 of the Congressional act it is said:

> That the United States Surveyor General for the district of Oregon shall cause said lands, so granted, to be surveyed at the earliest practicable period *after said State shall have enacted the necessary legislation to carry this act into effect* (B. F. 4) (Italics ours).

This contemplated that the Legislature should pass legislation to carry the act into effect. The character

of the legislation was left to the state, with, of course, this exception, that it must be in harmony with the terms of the grant, for it is not reasonable to say that Congress contemplated legislation which would be in disregard of its will. In all other respects, however, Oregon was permitted to proceed as it might think wise touching the matter. In pursuance of this authority, given to it by Congress, it passed the act of October 20, 1870, transferring the grant to the Wagon Road Company.

That Section 6 gave the state the right to transfer the land, is further supported by the Congressional act of 1874, which authorizes the issuance of patents to the state:

> Unless the State of Oregon shall by public act, have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof.

This is a construction by Congress of the granting act (Cope v. Cope, 137 U. S., 682; Tiger v. Western Investment Co., 221 U. S., 286). It proceeds upon the theory that the state had the right, under that act, to transfer the land. It cannot be said to be a ratification of the transfer, because the act says that it does not grant "any new rights," and a ratification would be in effect the creation of a new right, but it is a clear recognition of authority in the state to transfer the lands, and this authority could have come to it only from the granting act.

(b) The Assent of the Company.

The Coos Bay Wagon Road Company filed its articles of incorporation with the Secretary of State of Oregon on April 15, 1868. They provide that the corporation was formed to "locate, construct, and keep open for travel a clay and plank road from Coos Bay in Coos County, Oregon, to Douglas County, Oregon," and fixed its capital stock at $40,000 (B. F. 26).

On January 31, 1870, by an amendment to its articles, the company provided that the contemplated road should extend from Coos Bay to Roseburg (B. F. 29), the points between which the road was finally constructed.

Shortly afterwards, the Commissioner of the General Land Office received from Mr. Aaron Rose, as president of the Wagon Road Company, a letter, in which this occurs:

> Herewith I have the honor to transmit to you a copy of an "Act of the Legislative Assembly of the State of Oregon entitled 'An Act donating certain lands to Coos Bay Wagon Road Company' "; also transmit to you a map showing the survey and definite location of the road (B. F. 26).

On April 11, 1872, the Wagon Road Company again amended its articles of incorporation by inserting the following:

> This corporation hereby assents to and accepts the grant of lands, right of way and all of the conditions and provisions of the Act of Congress approved March 3, 1869, entitled "An Act granting lands to the State of Oregon to aid in the con-

> struction of a military wagon road from the navigable waters of Coos Bay to Roseburg in said State." And also of the Act of the Legislative Assembly of the State of Oregon, approved October 22, 1870, entitled "An Act donating certain lands to the Coos Bay Wagon Road Company." And also assents to and accepts all further acts of said Congress or of the Legislative Assembly of the State of Oregon granting lands or other property or things in aid of the construction of said road (B. F. 27).

The company, on the same day, further amended its articles of incorporation by stating that it was its purpose:

> Also to organize, establish and maintain a system of emigration from other states and territories of the United States and from Europe to the State of Oregon (B. F. 27).

This recognizes the purpose of the "restrictive proviso," and evidences the intention of the company to comply with it by disposing of the lands in small quantities such as immigrants are accustomed to purchase.

The first list of selected lands was prepared by the company on March 22, 1873. It contains this:

> "The Coos Bay Wagon Road Company under and by virtue of the Act of Congress entitled, 'An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg in said State, dated 3d of March 1869' and the Act of the Legislative Assembly of the State of Oregon approved 22d day of October, 1870, con-

> veying said 'grant' to the Coos Bay Wagon Road Company * * * hereby make and file the following list of selections of public lands claimed by said company as enuring to it, and to which it is entitled under and by virtue of the grants and provisions of said Act of Congress."

In the oath of the land agent of the company to the aforementioned list, occurs this language:

> I, A. R. Flint, being duly sworn, deposes and say that I am the land agent of the Coos Bay Wagon Road Company; that the foregoing list of lands which I hereby select is a correct list of a portion of the public lands claimed by the said company as enuring to the State of Oregon to aid in the construction of the wagon road * * * for which a grant of land was made by the *Act of Congress approved on the* 3d *of March,* 1869 * * * (B. F. 28) (Italics ours).

The company, therefore, undertook to do precisely what the state was to do in consideration of the grant; the state stepped out and the company stepped in (186 Fed. 887).

(c) Not a Sale.

There is nothing in the transaction which savors of a sale within the meaning of the "restrictive proviso."

In Williamson, et al., v. Berry, 49 U. S., 495, 544, it is said:

> We remark that "sale" is a word of precise legal import, both at law and in equity. It means at all times a contract between parties, to give and

> to pass rights of property for money,—which the buyer pays or promises to pay to the seller for the thing bought and sold.

Butler v. Thompson, 92 U. S., 412, quotes, with approval, the following definition from Benjamin on Sales:

> To constitute a valid sale, there must be (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; (4) a price in money paid or promised (p. 415).

In the same opinion it is observed (p. 415) "if any one of the ingredients be wanting, there is no sale."

Some of the "ingredients" are "wanting" in the transaction we are considering. There is no "mutual assent" to a sale, because there was no sale. Neither is there "a price in money paid or promised."

(d) There Was No Waiver.

In its answer the defendant claims the transfer was a breach of the restrictive proviso, and that the government, by the Act of 1874, waived the breach. This is untenable. The act interprets itself when it says:

> *Provided,* That this shall not be construed to revive any land grant already expired nor to create *any new rights of any kind* except to provide for issuing patents for lands to which the State is already entitled.

To waive the restrictive proviso would be to create a new right in the grantee, for it would thereby give to the grantee what it did not have before, viz: the right to dispose of the land without any restrictions. But the act says pointedly that it is not "to create any new rights of any kind."

Moreover, it is the law that a waiver:

> *Must, to be effectual, not only be made intentional, but with knowledge of the circumstances* This is the rule when there is a direct and precise agreement to waive the stipulation. *A fortiori* is this the rule when there is no agreement either verbal or in writing to waive the stipulation, *but where it is sought to deduce a waiver from the conduct of the party* (Bennecks v. Insurance Co., 105 U. S., 355, 359; United States v. Oregon & California R. R. Co., et al., 186 Fed. 861).

If Congress regarded the transfer as a violation, it is not thinkable it would have approved it. Congress is not accustomed to condone a violation of law. To contend that it did so in this case, is to argue that Congress deliberately and knowingly turned its back on one of its fixed policies—a policy it had established but five years before, after the most thorough consideration—namely, the policy of requiring the beneficiaries of a public grant like this, to sell in quantities of 160 acres, and at a price not to exceed $2.50 per acre. Neither is it reasonable to suppose that if Congress intended to abrogate the restrictive proviso it would have done so by indirection, or by an act which declares its purpose to be not "to create any new rights of any kind."

(e) Under No Circumstances Would the Wagon Road Company Have the Right to Convey the Land in a Body.

During the oral argument below, inquiry was made as to whether the Wagon Road Company could have conveyed to Miller without violating the grant, if he had agreed to take the land subject to all the conditions and limitations of the granting act. We answer: no. The State of Oregon, as we have seen, was authorized by Section 6 of the granting act to make a transfer of the whole grant for the purpose of carrying the act into effect, but no other grantee was given this authority.

Congress, by the restrictive proviso, intended to prevent land monopoly. This could not be accomplished, if the land might be transferred in a body from one grantee to another. The granting act imposed upon the state the duty of selling the land. If it had not been for Section 6 there would have been no authority to make the transfer to the Wagon Road Company, but this authority was not extended by the section, or otherwise, to the Wagon Road Company. It was the intention of Congress that the state, or its authorized substitute, should break up the land into small tracts and sell at prices that would induce purchasers and settlers. In no other way could the Congressional policy of opposition to land monopoly be worked out (186 Fed. 894).

IV.

BREACHES OF THE PROVISO BY THE WAGON ROAD COMPANY, AND THE KNOWLEDGE OF THE DEFENDANT AT THE TIME IT PURCHASED.

(a) Sales Unauthorized by the Grant.

The bill charges that the three conveyances by the Wagon Road Company, one of 35,534 acres on May 31, 1875, to John Miller, one of the wagon road on the same day to John Miller, and one of 61,143.37 acres on January 7, 1884, to William H. Besse, were in violation of the restrictive proviso. In addition, there were four other unlawful sales by the Wagon Road Company; 763 acres to J. M. Eberline on Dec. 6, 1873; 1,020 acres to Thomas J. Beals on Feb. 8, 1875 (Bill, Ex. "A," R. p. 36); 200 acres to Joseph J. Shook on Oct. 27, 1877, and 320 acres to R. M. Gurney on Jan. 24, 1881 (Bill, Ex. "G," R. p. 127). These transactions are all admitted by the answer (B. F. 14, 16).

(b) Knowledge of the Breaches by the Defendant.

The answer says that the defendant at the time it purchased had "no knowledge *other* than as disclosed by the records and legislation with reference to said lands" (B. F. 17, 18).

It also says:

> That before purchasing defendant carefully examined all legislation by Congress and by the State of Oregon affecting the title to said lands

> and made special inquiry concerning the same * * * and, that before making said purchase the defendant carefully examined the patents for said land in said bill, described as No. 1, 2, 3 and 4 (B. F. 20).

The records, of course, disclosed that Congress was familiar with the character of the land at the time it passed the act; the terms of the congressional and state acts; the fact that the patents recited that they had emerged in pursuance of the granting act, and that many sales and conveyances had been made in violation of the act. In addition to all this the answer alleges:

> That before making said purchase said defendant further prosecuted its search into the validity of the title to said lands and * * * found and avers the fact to be as follows:

Then, commencing on page 169 and ending on page 178, the answer sets out 19 classes of information gathered in the search. These classes show violations of the grant, as well as other things.

More complete knowledge of the breaches complained of could not well exist, and it is all confessed by the defendant.

Apart from these admissions, the law would charge the defendant with all the knowledge which it concedes it had at the time of making the purchase; but when we couple constructive knowledge with actual knowledge the case is stronger, and convicts the defendant of deliberately purchasing a title which it knew its grantors had no right to sell, except in conformity with

the restrictive proviso. In the presence of this fact the defendant is certainly in no position to claim any special consideration at the hands of a court of equity.

V.

EQUITY HAS JURISDICTION OF THIS CAUSE.

Congress authorized the bringing of this action by the same joint resolution, approved April 30, 1908, by which it authorized the suit against the Oregon and California Railroad Company (B. F. 10).

The facts in this case with respect to possession of the land are similar to those in the latter case. In that case it appeared that the land was wild and unoccupied, with the exception of a few acres which had been rented by the defendant company. In this case the land is also wild and unoccupied, with the exception of 693 acres which were in the possession of tenants at the time the action was instituted (B. F. 35). In all other respects the two cases are exactly alike. Moreover, appellant concedes that equity has jurisdiction (Brief pp. 1-82).

In view of the foregoing considerations, the government is entitled to a decree, unless someone of the affirmative defenses presented by the defendant is tenable.

PART II.

AFFIRMATIVE DEFENSES.

VI.

The Action Is Not Barred.

The defendant pleads that the action is barred by waiver, acquiescence, laches, ratification, estoppel, adverse possession, the statute of limitations and certain other statutes referred to in the answer (B. F. 19). Most of the questions thus presented are disposed of in the Oregon & California case (35 S. C. R. 908). We state them separately.

(a) Waiver Does Not Apply.

Without knowledge of the right waived and an intention to relinquish it, there can be no waiver. This proposition was affirmed in the Oregon & California case (186 Fed. 888).

The facts in this case are the same as in that. There is no proof that notice of the breaches came to any representative of the government, except such as was received by the departments of the Interior and of Justice through the suits prosecuted by the government against the Coos Bay Wagon Road Company, Southern Oregon Company and others.

None of these suits were instituted prior to 1896—12 years after the defendant purchased (B. F. 83).

The proof fails to show that any notice of the violation was brought, in any form, to the attention of Congress before the introduction of the joint resolution authorizing the commencement of this suit. Knowledge on the part of any other body, or of any official of the government, would be ineffectual, because, as this court held in the Oregon & California case, Congress alone has the power to waive the restrictive proviso (186 Fed. 888).

(b) Mere silent acquiescence and breaches of a condition never constitutes waiver of either the breaches or the condition (Oregon & California case, 186 Fed. 888).

(c) The mere waiver of breaches of a condition will not constitute a waiver of the condition itself (Oregon & California case, ib; Hawkins v. United States, 96 U. S. 689; New York Indians v. United States, 170 U. S. 1; and Schulenberg v. Harriman, 88 U. S. 44).

(d) Constructive Notice Ineffectual.

Waiver, as we have seen, implies actual knowledge. It will never be presumed from constructive knowledge alone.

Besides, a party is never held to have constructive knowledge of instruments recorded *subsequent* to the passing of his own title (Oregon & California case, ib; A. & E. Enc. of Law, Vol. 24, p. 146; Rannels v. Rowe, 145 Fed. 296).

(e) Statutes of Limitations.

(1) It is said that section 391 of Lord's Oregon Laws bars this action. The right of the government to bring an action in its own courts, cannot be limited by any action of the State. This goes without saying.

(2) The effect of the congressional acts of March 3, 1891, and March 2, 1896, was passed upon in the Oregon & California case.

The facts here being the same as there, a like result must follow.

(f) No Ratification.

It is claimed by the defendant that the transfer from the State to the Wagon Road Company was a violation of the act, and that Congress, by the act of June 18, 1874, ratified this violation, and thereby waived and abandoned the restrictive proviso (B. F. 15). We have already discussed this question (*supra,* pp. 18, 19), but an additional word may not be amiss.

The act is entitled "An Act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases." When the bill was under debate in the Senate, the following occurred:

> Mr. Edmunds: There ought to be a provision in that bill that this act shall not revive any land grant which has already expired, and providing that this bill shall create no new rights of any kind.

Senator Kelly from Oregon answered: I have no objection to such an amendment; but the bill only applies to roads already completed.

Thereupon Mr. Edmunds offered his amendment, which reads:

Provided, that this act shall not be construed to revive any land grants already expired, or to create any new rights of any kind.

Commenting upon the amendment, Senator Sargent said:

If you say "rights of any kind" there will be no effect in the bill. This bill gives the right to issue patents. There was an oversight in the original law by which it was not provided that any patent should issue although all the obligations required by the government should be complied with. I think the last words of this amendment are so sweeping that they would prevent the bill from having any effect at all.

Mr. Edmunds replied:

Then add "except to provide for issuing patents for lands to which the state is already entitled" (B. F. 29).

When the bill came up in the House, Mr. Willard of Vermont said:

I think that ought to go to the Committee on Public Lands.

Mr. Townsend replied:

The Committee on the Public Lands have examined this bill. It provides for nothing but

issuing patents for lands which have already been granted.

The bill was then passed (B. F. 30).

Now, note the language of the proviso of the act; "this shall not be construed * * * to create any new rights of any kind except to provide for issuing patents for lands to which the State is already entitled." Yet the defendant contends it creates another right, namely, the right to dispose of the land without reference to the restrictive proviso. Obviously this cannot be true.

(g) The Effect of the Issuance of the Patents.

The Secretary of the Interior before issuing the patents was not required to decide whether or not the act of the Oregon legislature of October 20, 1870, or any other act or transaction, whether by Oregon or by any person, formed a breach of the proviso in the granting act. He had no power to decide it, and did not attempt to do so.

Moreover, as was said by the Supreme Court in the Oregon & California case, this suit is one—

> To enforce a continuing covenant. It is not a suit to vacate and annul patents (p. 922).

The issuance of the patents was, therefore, neither a ratification nor a waiver.

(h) Adverse Possession.

It does not require citation of any authorities to show that title cannot be acquired by adverse possession against the United States.

(i) The Government Is Not Estopped.

The government is not estopped, except by an affirmative act of some authorized agent (Oregon & California case, 888).

The Supreme Court of the United States, speaking through Judge Brewer, has said, in effect, that estoppel exists only where the act is done by an executive officer, or agent, specially authorized by Congress (United State v. California & Oregon Land Company, 148 U. S. 31; United States v. W. V., etc., 54 Fed 807, 812).

Failure to act, then, does not constitute an estoppel against the government.

Outside of the passage of the act of 1874, and the issuance of patents in pursuance thereof, there is no affirmative act by any officer of the government with respect to the title. We have shown that this act did not justify the defendant, or any other person, in believing that the government had waived the restrictive proviso, or any other provision, of the granting act (*supra*, pp. 27, 29).

The claim of defendant upon this point, as stated in the answer, is that section 8 of the act of March 3, 1891, the act of March 2, 1896, both statutes of limitations, the decree in the suits referred to by the answer, and the failure to act sooner with respect to the breaches, constitute an estoppel. Neither the statutes nor the decrees warrant the claim (See supra, p. 27, and infra, p. 51). The failure to act is not, as we have just seen, ground of an estoppel. It belongs to the category

of laches, and the Supreme Court of the United States, overruling Judge Deady in the 42 Fed., 360, has declared that laches is not attributable to the government (United States v. The Dallas M. R. Co., 140 U. S. 549; United States v. Insley, 130 U. S. 263; Van Brocklin v. State of Tennessee, 117 U. S. 151; United States v. N. C. & St. L. Ry. Co., 118 U. S. 120; Oregon & California case, 888).

The defendant presented at the bar a number of decisions in support of its contention that the government is estopped (U. S. v. Will. Val. & Cas. Wagon Road Co., 54 Fed. 807; U. S. v. N. P. Railroad Co., 95 Fed. 864-880; U. S. v. Clark, 138 Fed. 294; U. S. v. Budd, 43 Fed. 630). We have examined them all, and find that none of them hold a different doctrine from that outlined above.

The Supreme Court of the United States in the Oregon & California case (35 S. C. R. 921-2) disposed of all the foregoing contentions.

In that case the same arguments were made that are made here with respect to waiver, acquiescence, laches, ratification, estoppel, and the statute of limitations, and they were all rejected. The court said:

> It is contended that if sales were made under the limitations of the provisos, the breaches are acquiesced in, and for this the action and knowledge of the officers of the government are adduced, indeed the knowledge of Congress itself. * * * And cases are cited which it is contended establish that such circumstances might work an estoppel even against the government which, when it appears in

court it is contended, is bound like other suitors, and certainly establishes that for more than forty years, in view of the executive officers, the provisos were not conditions subsequent. Granting their strength in that regard, granting they have some strength in every regard, they have not controlling force, considering the provisos as simple covenants. And they cannot be asserted as an estoppel. No one was deceived, at least no one should have been deceived. No action was or should have been induced by them that would plead ignorance of the provisions and immunity from their responsibility (p. 921).

Moreover:

> We may observe again that the acts of Congress are laws as well as grants and have the constancy of laws as well as their command, and are operative and obligatory until repealed. This comment applies to and answers all the other contentions of the railroad company, based on waiver, acquiescence and estoppel, and even to the defense of laches and the statute of limitations (Id. 922).

In view of this language there is nothing left for discussion. No officer of the government has the right to waive the enforcement of a law, and the grant is a law. No officer of the government can do any act which will estop the government from enforcing a law. No officer of the government can do any act which will amount to an acquiescence in lawlessness so as to prevent the government from enforcing the laws whenever it thinks proper to do so. The grant is a law. By keeping this controlling fact in mind, all difficulties with respect to the questions now under review disappear.

VII.

THE RESTRICTIVE PROVISO IS NOT REPUGNANT TO THE GRANT.

(a) The Act Analyzed.

There is nothing inconsistent in the granting act itself. At the bar below it was urged that there was, but this is unsound. The opening part of Section 1 grants the land to the State of Oregon to aid in the construction of a wagon road. The first proviso requires that the lands shall be exclusively applied to the construction of the road. The next proviso—the one containing the restrictions—makes it incumbent on the grantee to sell the lands in quantities not greater than one quarter section to one person and for a price not to exceed $2.50 per acre. Following that are two provisos reserving mineral lands, homesteads, and pre-emptions, from the grant.

Section 2 enacts that the lands shall be disposed of by the legislature for the purposes named in Section 1, and that the road provided for shall be and remain a public highway for certain uses of the government.

Section 3 says how the roads shall be constructed.

Section 4 gives authority to the grantee to select indemnity lands.

Section 5 declares that when ten continuous miles of the road are completed, not to exceed thirty sections

"may be sold," and so on, from time to time, until the road shall have been completed; and if the road is not completed within five years, no further sales shall be made, and the lands remaining unsold shall "revert to the United States." This is followed by a proviso that the lands granted shall not exceed three sections per mile for each mile constructed.

Section 6 imposes upon the Surveyor General the duty of surveying the lands "after said State shall have enacted the necessary legislation to carry this act into effect."

The provision requiring the lands to be exclusively applied to the construction of the road is not inconsistent with the one restricting the sales to 160 acres to one person at a price not to exceed $2.50 per acre. Both provisions can be obeyed. Neither is the provision of section 5 forbidding the sale of any land, before ten continuous miles of the road are completed, and prohibiting the sale of more than thirty sections for each ten miles thereof, inconsistent with any other part. It does not require that thirty sections *shall* be sold as each ten miles are finished, but provides that they "*may* be sold as each ten miles are finished." This can be followed and the restrictive proviso obeyed to the letter.

The part of the act which says "that, if the road is not completed within five years, no further sale shall be made, and the lands remaining unsold shall revert to the United States," presents nothing that is irreconcilable with the restrictive proviso. We appre-

hend the court will find no difficulty in reconciling that proviso with all the other provisions of the act.

(b) Defendant's Authorities on This Point.

A great many authorities are offered by the defendant to support its argument that the condition subsequent is repugnant to the grant. (De Peyster v. Michael, 6 N. Y. 467-492-493; Madlebaum v. McDonnell, 29 Mich. 77-97; Anderson v. Carey, 36 Ohio St. 506-575; Case v. Devire, 15 N. Y. 265-266; Bennett v. Chapin, Vol. 7 L. R. A. 377-381; Latimer v. Waddell, 3 L. R. A. 668-678 (26 S. E. 122); Potter v. Couch, 141 U. S. 315; Scovil v. McMahan, 21 L. R. A. 58; Vandershie v. Hanks, 3 Cal. 28-41; Burnham v. Burnham, 79 Wis. 557). A careful examination has failed to reveal that they aid this contention, even in the least. In the first place, they all deal with common law principles. They say that according to those principles, certain restrictions upon the power of alienation are repugnant to the grant. But of what force are common law principles when they come into conflict with an act of Congress? Congress may modify them or override them entirely (Oregon & California case, 883, 892; Rutherford v. Greene, 15 U. S. 196; Lessieur v. Price, 53 U. S. 59). If it has done so in this case, that does not make its act invalid.

Besides, the decisions in those cases, even on the theory that the common law applies to the action at bar, do not affect the question at issue here, if we are to take the following from Potter v. Couch, *supra,* as illustrative of the holdings in other cases. We quote:

> But the right of alienation is an inherent and inseparable quality of an estate in fee simple. In a devise of land in fee simple, therefore, a condition against all alienation is void, because repugnant to the estate devised.

There is nothing "against *all* alienation" in the grant we are considering; on the contrary, the grant requires alienation.

In addition, the same argument was presented in the Oregon & California case and overruled by the Supreme Court. Stating the position of the defendants, the court said:

> The conclusion is deduced that the actual settlers' clauses, viewed even as covenants, were either impossible of performance or repugnant to the grants, and therefore void (p. 919).

Answering this, it gave a certain example, and then said of the provisos:

> They are, it is true, cast in language of limitation and prohibition; the sales are to be made only to certain persons, and not exceeding a specified maximum in quantities and prices. If the language may be said not to impose 'an affirmative obligation to people the country,' it certainly imposes an obligation not to violate the limitations and prohibitions when sales were made (p. 920).

Again, speaking of certain contentions of the defendants, the court said that they would confine the restrictive provisos—

To the compulsion of sales of land susceptible of actual settlement, and assert that the evidence established that not all of the lands, nor indeed the greater part of them, have such susceptibility. But neither the provisos nor the other parts of the granting acts make a distinction between the lands, and we are unable to do so. The language of the grants and of the limitations upon them is general. We cannot attach exceptions to it (p. 920).

VIII.

THE RESTRICTIVE PROVISO IS NOT IMPOSSIBLE OF PERFORMANCE, BUT IF IT BE, THAT FURNISHES NO JUSTIFICATION FOR ITS BREACH.

(a) The Law.

The defendant urges that it was impossible for the Wagon Road Company to comply with the restrictive proviso because of the character of the land; that the Wagon Road Company endeavored to do so, but was unable to find purchasers for tracts of 160 acres.

Many witnesses were called by defendant to testify with respect to the character of the lands. We objected, and still object, to the materiality of their testimony. No matter what the character of the land was, the grantee was bound to observe the restrictive proviso (*infra* 48).

"If the provisos were ignorantly adopted," says the Supreme Court in the Oregon & California case,—

> As they are asserted to have been; if the actual conditions were unknown, as is asserted; if but little of the land was arable, most of it covered with timber and valuable only for timber, and not fit for the acquisition of homes; if a great deal of it was nothing but a wilderness of mountain and rock and forest; * * * the remedy was obvious. Granting the obstacles and infirmities, they were but promptings and reasons for an appeal to Congress to relax the law; they were neither cause nor justification for violating it (p. 920).

But the facts show that the restrictive covenant was not impossible of performance.

The testimony presented by the government on this subject is rebuttal. If the defendant's testimony is disregarded, then so should the government's be disregarded. But however that may be, the testimony on this point is overwhelmingly against the defendant.

(b) Lands Sold Without Effort.

During the five years preceding the transactions with Miller, the Wagon Road Company made 53 sales, embracing 6,963 acres, for a stated consideration of $17,306.77. Only two of these sales were in violation of the grant. This is shown by Exhibit "A" attached to the bill, page 27, and admitted by the answer, page 3. No effort was required to make these sales.

J. A. Cotton, who lived in the neighborhood of the land for upwards of 36 years, testified on cross-examination "that he knew of no efforts on the part of the Coos Bay Wagon Road Company to sell."

If the company was able to make 53 sales without effort, it is but fair to say that if it had organized a land department; advertised its holdings and vigorously sought purchasers, thus serving one of its stated purposes of existence, viz., the encouragement of immigration, it could have disposed of all the lands in conformity with the grant.

(c) The Wagon Road Company Discouraged Purchasers.

Persons whom Dr. Hamilton, president of the company, sent upon the land subsequent to 1875, with the premises that if they would settle upon tracts of 160 acres, they would receive title at $2.50 per acre, were all deceived. He kept his promises with none of them after the date of the Miller conveyance (B. F. 46 *et seq.*).

(d) The Lands Taken Off the Market.

The testimony is abundant and without contradiction that the Wagon Road Company, Oregon Southern Improvement Company and Southern Oregon Company took the lands off the market and refused to sell at the price fixed in the grant. In fact, they refused to sell at any price, except in very rare instances.

A. T. Siglin, who has resided in the neighborhood of the land since 1871, has been Treasurer and Sheriff of Coos County, therefore, thoroughly familiar with what was going on in the county, said that the land could have been readily disposed of, at least the larger

portion of it, if the owners had been willing to sell it within the terms of the grant, and that he knew, some years ago, of people very anxious to purchase (B. F. 54).

Twenty-two other witnesses testified to substantially the same thing.

George W. Loggie, who was manager of the Oregon Southern Improvement Company and the Southern Oregon Company for seven years, commencing in 1885, said, that President Elijah Smith forbid him to sell to anybody. In this he is supported by Robert E. Shine, bookkeeper, secretary and local manager from 1888 to 1911, and by Frank Batter, manager under Mr. Loggie (B. F. 46).

Then there are the 600 applicants who were refused (B. F. 48).

The foregoing establishes that the companies refused to sell the lands. No one denies this. What then becomes of the defense that the lands could not be sold?

Defendant offered Exhibit 216, a certificate from the Board of Land Commissioners of the State of Oregon, to show that lands belonging to the State, and within the limits of the grant were not sold. The purpose of this, we take it, is to show that, because the State did not sell, the Wagon Road Company could not sell. But why spend any time dealing in inferences, when we have the cold fact that neither the Wagon Road Company nor the defendant *would* sell when it

had opportunities to do so? A fact is better than a guess.

(e) Character of the Land.

However, the evidence does not sustain the contention that the character of the lands forbids settlement. There is some testimony that the hill lands taken alone are not fit for settlement, but the great weight of the testimony is to the effect that a very large percentage of the land is tillable. This is in accordance with the testimony of the best informed witnesses.

We take the following from the testimony of the witnesses named:

Miller, G. P.—Came to Douglas County in 1874; carried mail over the wagon road; the part of the land which could not be used for farming was suitable for fruit raising or grazing.

Loggie, George W.—Manager of the Oregon Southern Improvement Company and Southern Oregon Company for seven years; 60 per cent of the land could be cultivated after it was cleared, and 15 per cent in its natural condition; cost of clearing, $60.00 to $100.00 per acre. Had wide experience in clearing land.

Buell, A. S.—Resided on wagon road from 1870 to 1889; the bottom land would make fine agricultural land if cleared, and mountain land could be used for grazing after the removal of the timber.

Siglin, A. T.—Resided in Douglas County since 1870, formerly deputy collector of customs; county

treasurer and sheriff; estimated that 90 per cent of the land was susceptible of raising crops or fruits, and 10 per cent worthless.

Fitzgerald, John—Resided near wagon road since 1871; a settler could earn a living by clearing a small patch and raising stock, confining the stock to his 160-acre tract. In 1870, 160 acres of the bottom land along the wagon road could be purchased for $2,000.00 to $2,500.00; a settler could make a living on 160 acres of the hill land. Messrs. Bennett, Wilson and Hamilton settled on mountain lands within the area of the road grant and made their homes there.

Muray, W. R.—In 1886 settled on a tract of the wagon road land; was of the opinion that 75 per cent of the land grant could be used for pasture land and farmed after clearing. There is not a great deal of grant land in Coos County that would not make pasture land if cleared, and a portion of it is good pasture land in its present condition; cleared and cultivated land selling for $100.00 and $200.00 an acre.

Hutson, J. M.—Lived on wagon road land from 1871 to 1879; left because company would not sell to him; the land he settled on was splendid for agricultural purposes; the hill land could be used for pasture after the removal of the timber.

Harlocker, Earl—Came to Coos Bay country in 1871; statistical correspondent for the Agricultural Department 30 years; reported on the character of the land, soils and crops; in 1913, he, with two others,

classified the lands in Coos County into tillable and non-tillable, including in the tillable such as could be cultivated after the timber was removed; estimated that 90 per cent of the wagon road land is tillable, and so reported to the Government.

Many other witnesses testify to the same effect (B. F. 63 *et seq.*).

Against this is the testimony of the following witnesses:

Cotton, J. A.—Said he did not know the boundaries of the grant; never saw the grant; asked what proportion of certain land described to him would be bottom land, he said, "Pretty hard question to answer. I could not say what it was, possibly one-twentieth."

Gurney, S. A.—One-tenth of the area outside of Looking Glass and Flournoy valleys could be cultivated; the other nine-tenths is assessed as grazing land.

Coats, W. H.—Said that only one-tenth of the land is cultivable, and that, he "would not consider the nine-tenths worth much of anything."

This, too, in face of the fact that A. M. Simpson paid $19,000 for one section.

Bushnell, A. E.—His testimony covers a distance of 14 miles, from Weston to Brewster Valley; the timber on that land, he said, was not worth much; yet, he has lived on 160 acres for 12 or 15 years and raised a family.

Johnson, A. W.—Not well acquainted with Township 28, Range 7 West; the land he is familiar with is in the mountains and is rough; resides on 563 acres, 403 of which he bought in 1889 at $5.00 an acre.

Rose, I. E.—The land is hilly, covered with timber, small brush, bottom land. The land he got was straight up and down; he burned it off and made a pasture of it, and it has growed up again.

Stemler, J. P.—Never went over the land to examine it; all he knows about it is derived from traveling over the road; could not see very much of the land from the road; resides on 370 acres, for which he asks $11,000.

Bettis, William—Never made an examination of the wagon road land for the purpose of determining its character; a small portion of the land is bottom land; good portion timber and hill land; his father paid $2.50 an acre to the Wagon Road Company for 160 acres in 1874.

Lawhorn, L. A.—The hill lands are generally heavily timbered; second growth timber with underbrush; in addition to the hill and bottom land there is bench land, some of which is tillable and good for grazing, but not for staple crops.

We submit the foregoing testimony is indefinite, and not sufficient to overcome the testimony of the witnesses called by the plaintiff.

If it be urged that those who applied to purchase desired only the bottom lands, and that if the company

sold to them at $2.50 per acre, all the rest would be unsalable, we answer: even then the Wagon Road Company would have made money. The defendant's witness Gurney says that one-tenth of the area outside of Looking Glass and Flournoy valleys could be cultivated. Assuming this to be true, the valleys would make about another tenth, thus two-tenths or 20,000 acres, in round numbers, would be cultivable. Let us, to be safe, put it at 15,000 acres. All defendant's witnesses speak of the bottom land only as cultivable. This land would have sold rapidly at $2.50 per acre—it was worth nearer $10.00. At $2.50 an acre the 15,000 acres would have brought $37,500, $4,000 more than the wagon road cost (infra 75), add this to the $37,200 obtained from the sale of the road (B. F. 15), and the $17,000 for the 6,963 acres disposed of before 1875 (supra, 36), and we have the following:

Sale of 15,000 at $2.50 per acre.....	$37,500
Sale of wagon road.....	37,200
Sale of 6,963 acres before 1875...about,	17,000
	$91,700
Cost of wagon road.....about,	33,000
Credit balance.....	$58,700

With this balance the company would have left about 70,000 acres of timber land, which it could well afford to hold for a favorable market. Assuming, we repeat, that those who sought to purchase desired only bottom land, the company's refusal to sell is devoid of justification, even on its own theory.

(f) The Intention of Congress.

If ever there was a granting act passed by Congress with full knowledge of the character of the land affected, it is the act we are considering.

The bill was introduced in the Senate by Mr. Williams of Oregon. Many amendments were offered and debated in the Senate (Third Session, Fortieth Congress, Globe, pp. 249-250).

Mr. Williams said:

> I have a map here, and can exhibit the condition of the country and the situation of the points referred to if the Senator desires to look at it; but I will state to the Senator that Roseburg is the county seat of Douglas County, and the chief town of the Umpqua Valley. It is surrounded on all sides by mountains. This bill proposes to assist in the construction of a road from Roseburg to the navigable water of Coos Bay through the Coast Range of mountains, so that there may be access to the ocean from Roseburg through the mountains. It is a very difficult and expensive road to construct, and it is very necessary to the people there that they should have this way of egress and ingress. The distance is a little more than fifty or sixty miles.
>
> There are *some small valleys* in these mountains in *which* the land *may* be *worth something,* and it is possible that there may be some timber on the mountains that may be used by the State in the construction of this road with advantage. * * * (Italics mine).

Mr. Hendricks said:

> * * * The road will be a costly one to build, and

the *lands* for a very *considerable* distance in the mountains will *not be* of *value.* * * * It (the road) will be mainly through a region of country that is not now inhabited, and that it will be *difficult* to *settle* perhaps, but it will conect a desirable part of the country with the coast.

The bill passed.

In the House of Representatives Mr. Julian moved this amendment:

> Provided, that the grant of lands hereby made shall be upon the condition that the lands shall be sold to *actual settlers* only in quantities not greater than one quarter section and for a price not exceeding $2.50 per acre (Italics mine).

Mr. Mallory, Congressman from Oregon, remarked:

> I am sure that if the House understood this bill there would be no objection to it. Those who are acquainted with the geography of the State of Oregon know that along the line of the coast there is a high range of mountains known as the Coast range. Between that range of mountains and the Cascade mountains there is a succession of valleys. * * * *A large portion of the land proposed to be granted is not worth anything.* Most of it lies on this range of mountains and *could not be sold for one cent an acre.* Some of it may be valuable in the construction of this road. * * *
>
> In the valley of the Umpqua there is a considerable settlement, and at the Coos river, on the coast, there is another settlement; but along the line extending about sixty miles it is an *unbroken wilderness.* * * *
>
> The grant is made to the State of Oregon, and it is to be controlled by the Legislature. *I have no*

objection to the amendment offered by the gentleman from Indiana (Italics mine).

Mr. Julian, with the consent of the House, modified his amendment by adding after the words " a quarter section" the words "to each person," and the amendment as modified was passed (B. F. 86).

The bill was returned to the Senate; but the House amendment as laid before it, did not contain the words "actual settlers." How they came to be dropped is not disclosed by the record, but Mr. Julian's amendment, with the exception of these two words, was adopted and the bill became a law.

The fact, if fact it be, that the land is chiefly, or only, valuable for the timber on it, and unfit for cultivation, furnishes no reason for believing that Congress did not mean to limit the quantity that might be sold to one person to 160 acres. The Timber and Stone Act of June 3, 1878, does so, and, in addition, provides, that the lands shall not be sold for less than $2.50 per acre (20 Stat. 89). In many instances it has been sold for more, the price depending upon the character of the timber. It is a matter of common knowledge that millions of acres have been sold under that act. Why then should the land not be sold under this one?

Congress, however, with full knowledge of the nature of the land, imposed the restrictive proviso. It represents the behest of the law making power, and must be obeyed.

(g) The Law With Respect to Impossible Conditions.

The State of Oregon, the Wagon Road Company, and every grantee of that company were, of course, thoroughly familiar with the character of the land at the time they received title thereto. They well knew whether the conditions imposed by Congress could be performed. There was no law compelling them to accept the land with those conditions. If they felt that they could not comply with them, good faith and common honesty alike demanded that they reject the grant, unless they could induce Congress to amend it by eliminating the obnoxious provision. Instead of doing this, they accepted it and agreed to satisfy the conditions imposed. In these circumstances the law refuses to listen to their contention at this time, that the restrictive proviso is impossible of performance.

In Ingle v. Jones, 2 Wall 1, the defendant in error made a contract to construct a building, "and make it fit for use and occupancy." He built it as provided in the agreement, but owing to a latent defect in the soil on which the foundation rested, the building cracked, and part of it threatened to fall. This made it necessary to take the building down and rebuild the structure, which was done at a large expense. The contractor, defendant in error, contended that, having fulfilled his contract, he was not responsible for defects arising from a cause of which he was ignorant, and which he had no agency in producing, and, therefore, was entitled to recover the balance due upon the contract. The court in denying his claim said:

> This covenant it was his duty to fulfill, and he was bound to do whatever was necessary to its

performance. *Against* the *hardship* of the case he *might* have *guarded* by a provision in the contract. Not having done so, it is not in the power of this court to relieve him. He did not make that part of the building "fit for use and occupation." It could not be occupied with safety to the lives of the inmates. It is a well settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, *unless its performance is rendered impossible by the act of God, the law, or other party. Unforseen difficulties, however great,* will not excuse him. (Citing authorities. Italics mine.)

(h) Other Pertinent Observations by the Supreme Court.

In United States v. Bags of Coffee, 8 Cranch, 398, the Supreme Court, answering arguments similar to those urged here by defendant, in a suit brought to enforce a forfeiture provided for by an act of Congress, said:

> In the eternal struggle that exists between the avarice, enterprise and combination of individuals, on the one hand, and the power charged with the administration of the laws, on the other, severe laws are rendered necessary to enable the executive to carry into effect the measures of policy adopted by the Legislature.

IX.

THE DEFENDANT DECLARES THAT ALL QUESTIONS HEREIN INVOLVED ARE RES JUDICATA, BECAUSE OF THE DECISIONS IN CERTAIN CASES PLEAD IN THE ANSWER.

(a) Theory of Earlier Suits Inconsistent With the Theory of This Suit.

According to the answer there were two suits commenced on February 29, 1896, one on August 25, 1897, and one on February 18, 1896. These suits are numbered respectively 2284, 2283, 2406 and 2278. The record in each case is in evidence.

Case No. 2283 proceeded upon the claim that the lands described therein "lie entirely without the limits of the grant in said State of Oregon" and that, hence, the patent for them should not have been issued.

Case No. 2284 involved 30,044 acres of land and was based upon the theory that the lands were outside of the grant limits and had, therefore, been erroneously patented to the Wagon Road Company.

Case No. 2406 charges that the lands covered by it were "outside of the indemnity limits of the grant, and are, therefore, not subject to it," also, that the lands had been homesteaded by Samuel Braden long before the grants attached.

Suit No. 2278 covered 40 acres of land, which it claimed had been homesteaded and was therefore outside of the grant.

From the foregoing recital it is clear that all the suits were based upon the idea that the lands covered by them were not subject to the grant, and were, therefore, erroneously patented.

In the suit at bar, the contention is, that all the lands involved are *covered* by the grant, but that the restrictive proviso of the grant has been breached.

In the earlier cases it was urged that if title passed it did so erroneously, while in this case, the one we are trying, it is claimed by the government that title lawfully passed from the government, but that subsequent to its passage the restrictive covenant which was attached to the grant was breached. The theory, therefore, of those cases is entirely different from that of the instant case.

(b) Questions Decided in Earlier Cases Different.

Case No. 2284, as we have seen, was brought to cancel patents to 30,044 acres of land.

A demurrer to the bill was sustained and the action dismissed. There is nothing in the record of the case to show upon what ground the court rested its decision.

An official communication from the District Attorney, May 21, 1897, to the Attorney General, states that:

> The demurrer has been argued and the court has sustained the sale, holding that the United States were in no wise interested in this matter; that the real party at interest was the Oregon & California Railroad Company, the prior claimant, and that the suit should be brought in the name of the Oregon & California Railroad Company; that if the Government were to recover in the present litigation it would gain nothing thereby, and lands patented to the Coos Bay Wagon Road Company by the terms of the grant to the Oregon & California

> Railroad Company immediately go to said latter company in case the Government was successful in this litigation (B. F. 74).

This letter is admissible on the authority of Evanston v. Gunn, 99 U. S., 660.

Suit No. 2283 covered the same land as suit 2406. Speaking of this, Judge Bellinger said in suit 2406:

> It goes without saying, that there is no such thing as a demurrer to a general replication; such a replication is a mere formal matter and has the effect to put the case at issue, and there can be, thereafter, no judgment without the trial of the question of fact so presented. The general replication was in proper form, the form adopted in Story's Equity Pleadings, if it had been otherwise, and liable to objection, nevertheless, there could be no decree dismissing the bill on that account. I am of the opinion that the demurrer attempted to be pleaded is a nullity, but if it is not a nullity, it is clearly not a decree upon the merits, and is, for that reason, nor a bar to this suit (B. F. 75).

He was right, and the former decision may be treated as negligible.

Suit 2406 was decided in favor of the Government. The lands involved had been disposed of by the Wagon Road Company to the defendant. It was decided that the lands had been erroneously patented. The defendant was not a party to that suit, besides the decision touches no issue in this action.

Suit 2278 decided that the lands involved had not been homesteaded as alleged in the bill, and were, therefore, properly patented.

The question presented and decided in each case was entirely different from anything in litigation here.

(c) Different Cause of Action Here.

The evidence necessary to establish the cause of action presented here, would be utterly immaterial as to the causes of action in the prior suits. This is manifest. In the prior cases, the testimony related to the question as to whether or not the lands forming the subject of the action were within or without the limits of the grant. That was the only matter of fact litigated. Testimony bearing upon it would be immaterial in the present case, for no such question is involved here.

In Chapman v. Smith, et al., 16 How., 133, it is said:

> One criterion for trying whether the matters or cause of action be the same as in the former suit, is, that the same evidence shall sustain both actions.

In the Haytian Rep. 154, U. S. 118, it was decided that:

> One of the tests laid down for the purpose of determining whether or not the causes of action should have been joined in one suit, is whether evidence necessary to prove one cause of action would establish the other.

Cromwell v. County of Sac., 94 U. S. 351, is a leading case. The first action was on 23 coupons. It was held that they were invalid because issued fraudulently; that plaintiff purchased before maturity, but did not show, though he alleged, that he had paid value. A demurrer to the bill was sustained and the case

dismissed; the judgment was affirmed by the Supreme Court. Then the plaintiff sues on the bonds to which the coupons belonged, and offered to prove payment of value. The offer was refused on the ground that the question was involved in the prior suit and, hence, was *rem judicatam.* The case was taken to the Supreme Court and reversed.

Judge Field, speaking for the court, said:

> It is not believed that there are any cases going to the extent that, because in a prior action a different question from that actually determined might have arisen and been litigated; therefore, such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On *principle, a point not in litigation in one action cannot be received as conclusively settled in a subsequent action upon a different cause, because it might have been determined in the first action* (Italics mine).

In the case of Nesbitt v. Riverside Independent, District 144, U. S. 610, it was held that:

> When the second suit is on the same cause of action and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question which was *or might* have been presented and determined in the first action, but when the second suit is upon a different cause of action, although between the same parties, the judgment in the former action operates as an estoppel only, as to the point or question actually litigated and determined, and not as to other matters which might have been litigated and determined (Italics ours).

In each case the right of the plaintiff to recover on the bonds was in issue, but the facts upon which the right rested in the one case were different from those upon which it rested in the other, and, hence, judgment in the former was not a bar to the latter. Apply that rule here. In the earlier suits the Government sought, as it seeks in this suit, to recover the title to the lands, but in those suits its claim was based on an entirely different state of facts from the one upon which its claim rests in this case, therefore, following the rule of the Nesbitt case, the judgments in the former suits are not a bar to recover in this suit.

Other cases supporting the same reasoning are: Mobile v. Kimball, 102 U. S. 691; Roberts v. N. R. R. Co., 158 U. S. 26; Russell v. Place, 94 U. S. 606; N. P. Ry. Co. v. Slaght, 205 U. S. 122-131; Memphis City Bank v. Tennessee, 161 U. S. 186; McComb v. Frink, 149 U. S. 629-641; Stark v. Starr, 94 U. S. 477).

But however all this may be, the paramount ground which differentiates those cases from the one at bar is that this is an action to enforce a law (Oregon & California case, p. 920) which was not involved in anywise in those cases. Those actions did not rest on the same law. No action for the breach of this law has ever been brought before. The law on which the former actions were bottomed was wholly different. The causes of action are, therefore, not the same. The point involved here was not presented there.

> On principle, a point in litigation in one action cannot be received as conclusively settled in a subsequent action upon a different cause because it might have been determined in the first action (Cromwell case, 94 U. S., *supra*).

X.

DEFENDANT IS NOT A BONA FIDE PURCHASER FOR VALUE.

(a) Burden of Proof on Defendant.

The defendant alleges that it is a *bona fide* purchaser. To be such, it must prove that it purchased without knowledge of the granting act, in good faith, and paid a valuable consideration; or that someone of its predecessors, claiming under the grant, was such a purchased.

In United States v. Oregon & California Land Company, 148 U. S. 42, it is said:

> The essential elements which constitute a *bona fide* purchaser are, therefore, three: a valuable consideration, the absence of notice, and presence of good faith.

On page 44, speaking of certain facts, the court said, "but at the same time they are significant with respect to that element of good faith, which consists in *diligence*" (Italics mine).

In United States v. Brannan, 217 Fed. 849, recently decided, we read:

> To be entitled to protection as a *bona fide* purchaser, he must have bought in good faith and paid value * * * the burden is upon him to make satisfactory proof of purchase and payment. The recital in the deed to him did not constitute such proof (Citing many cases; see also United States v. Des Moines, 142 U. S. 510-530).

The Brannan case was cited with approval by this court in Tobey et al v. Kilbourne et al, 222 Fed. 760-4, and by the Circuit Court of Appeals for the Eighth Circuit in Stonebraker etc. v. United States, 220 Fed. 99-101.

This rule is not changed by the allegation in the complaint, that each and all of the parties mentioned in the bill, including the defendant, knew all the transactions complained of. The allegation is not necessary to the complainant's case; it is mere surplusage, and in no way affects the obligation of the defendant to bear the burden of proving that it is an innocent purchaser (Washington & Georgetown R. Co. v. Hickey, 166 U. S. 521; Preswood v. McGowan, 148 Ala. 475; Greenleaf on Evidence, 15th ed., Sec. 51; 16 Cyc. 405; United States v. Lewis I. Brannan, *supra*).

Has the defendant sustained this burden? No, as we shall show at once.

(b) Knowledge of the Wagon Road Company.

The grant from the state to the Wagon Road Company; the company's supplemental articles of incorporation (B. F. 27); President Rose's letter (B. F. 26); the promises of its president, Dr. Hamilton, to sell to settlers at prices not to exceed $2.50 per acre (B. F. 46 *et seq.*); the resolution of the board of directors, January 12, 1874, appointing A. R. Flint "selecting agent for the company;" and the patents from the Government, each of which recited that it was issued in pursuance of the Congressional granting act, show, without question, that the Wagon Road Company

had full knowledge of the grant and its terms, and, therefore, knew that it was violating them when it made the deeds, two to Miller, one to Besse, and others to divers persons. That its officers were conscious of wrongdoing, is disclosed by the circumstances that the Wagon Road Company carefully kept from the Government all knowledge of its contract with Miller and deeds in pursuance thereof, and continued to ask for and receive patents as if it had not deeded or contracted away the land (B. F. 5, 14).

(c) Knowledge of the Purchasers Intermediate the Wagon Road Company and Defendant.

(1) *Notice of the Granting Act.*

Every purchaser is charged with notice of the granting act, because it is a law (*supra,* point 1) and, like every other law, is conclusively presumed to be known to all persons.

(2) *The Recitals of the Patents.*

Each patent, as we have shown (B. F. 35) recites that it was issued in pursuance of the Congressional and Legislative granting acts. The patent is the usual foundation of title to land. This is generally understood. No man of the slightest prudence would deal with a title without consulting the patent, either personally or through another, especially if but a few transfers had been made since the title left the Government. And it is but fair to assume in this case, in view of the size of the transactions, that each purchaser did consult the patents and was aware of their recitals. In

any event, the law charges them with the knowledge they would have obtained if they had searched, and they will not be heard to say that they do not possess it. Diligence is an essential of the defense of **bona fide** purchaser (148 U. S. p. 44).

In Simmons Creek Coal Company v. Doran, 142 U. S. 417, 438, it was said:

> Whatever is sufficient to put a person on inquiry is considered as conveying notice, for the law imputes a personal knowledge of a fact, of which the exercise of common prudence might have apprised him.

(3) *Recorded Instruments—What They Show.*

The lands bought by the intermediate purchasers embraced a great number of acres, and cost a large sum of money. It is not believable, as we have just observed, that the purchasers invested without a careful study of the title as it was disclosed by the public records. Every document in connection with the title from the Government down, was, no doubt, carefully scrutinized by each grantee. Assuming this to be true, what did the recorded instruments, other than the patents, reveal? The two deeds, one to Miller and one to Besse, from the Wagon Road Company recited that the lands conveyed were part of the lands granted by the act of March 3, 1869, to the state, and by the state to the Wagon Road Company on October 22, 1870; and each deed thereafter, through which the Oregon Southern Improvement Company claimed title, referred back, either directly or indirectly, to the wagon road deeds. Thus bringing to the notice of each grantee the

fact that he was receiving a title which came through the granting acts. In view of this, he was bound to familiarize himself with the terms of those acts.

Through the trust deed, the foreclosure proceeding based thereon, deeds from the Master in Chancery to Rotch and Crapo, and by them to the Southern Oregon Company, the latter acquired the title possessed by the Oregon Southern Improvement Company, charged with all the obligations under which that company had held it.

In Williamson et al., v. Berry, 49 U. S. 495, 547, it is said:

> In any sale under a decree or order in chancery, the purchaser, before he pays his money, must not only satisfy himself that the title to the property to be sold is good, but he must take care that the sale has been made according to the decree or order.

(d) The Defendant's Knowledge.

(1) *Implied From the Records.*

The defendant is, of course, charged with all the knowledge, both actual and constructive, applicable to its predecessors in title.

In Simmons Creek Coal Co. v. Doran, 142 U. S. 417-437, it is said:

> Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. *Caveat emptor* is one of the best settled maxims of the law, and applies exclusively to a purchaser. He must

take care, and make due inquiries, or he may not be a *bona fide* purchaser. He is bound not only by *actual,* but also by *constructive* notice, which is the same in its effect as actual notice. He must look to title papers under which he buys, and is charged with notice of all the facts appearing upon their face, *or to the knowledge of which anything there appearing will conduct him.* He has no right to shut his eyes or his ears to the inlet of information, and then say he is a *bona fide* purchaser without notice (Burnell's Adm'rs. v. Fauber, 21 Gratt. 446-463; Washington Sec. Co. v. United States, 234 U. S. 76-79).

Besides defendant has not shown, nor attempted to show, that it did not have all that knowledge, and as we have seen (*supra*, p.) the burden of proof is on it to show it did not.

(2) *Defendant Admits Knowledge.*

It is alleged in the answer that defendant had no knowledge 'save what was derived from the records'' (B. F. 42). This is quite enough. But the answer goes further and states affirmatively that before purchasing defendant ''carefully examined all legislation by Congress and by the State of Oregon affecting the title,'' and also examined the patents. In addition to this the answer admits that at the same time the defendant had knowledge of the deeds, which the bill charges were given in violation of the restrictive proviso (B. F. 42). A grantee cannot be a good faith purchaser if, at the time of its purchase, it knows every defect in the title purchased. The defense of *bona fide* purchaser must fall.

XI.

NO EQUITIES IN FAVOR OF DEFENDANT.

(a) Alleged Inequitable Conduct on Part of Government.

It is said that even if the Wagon Road Company violated the restrictive proviso, and even if the court must find that the defendant purchased with full knowledge of the breaches, and, in consequence must be denied the status of innocent purchaser for value without notice, still, because of certain alleged equities, a strict enforcement of the grant should not be had, but that a decree in favor of the complainant should be conditioned upon the Government returning to defendant all that it has expended on account of the lands.

This contention is made upon the assumption that the defendant believed, when it purchased, that it was acquiring a valid title, *and* that this belief was induced by the conduct of the Government.

Upon what act of the Government could this belief be predicated? Not upon the debate in the Senate, or in the House, at the time the granting act was on its passage; not upon the granting act itself, the act of 1874 authorizing the issuance of patents, nor the issuance of the patents. And these are all. We have heretofore examined them and found that they do not raise an estoppel against the Government; and if they do not constitute an estoppel, which is a defense equitable in its nature, they do not support other equities in favor of the defendant.

The failure of the Government to include the breaches of the condition subsequent in the 1896 and 1897 suits, could not have affected defendant's action when making the purchase, for the obvious reason that it did not occur until nine or ten years afterwards; nor should it have influenced the defendant in making subsequent expenditures. The defendant was charged with the knowledge, for it is the law, that no executive officer of the Government, without specific authority from Congress, could waive the enforcement of a law, and, hence, that the failure of those officers to bring such action was no evidence whatever that the Government did not intend to enforce the restrictive proviso.

But is not this entire contention based upon the theory of laches, or stale claim? The Government is not open to the defense of laches (U. S. v. O. & C. *supra*, 888). This was pointedly decided by the Supreme Court in United States v. Dalles Mil. R. Co., 140 U. S. 599, *supra*. That, too, was an equity case. Judge Deady had applied to the Government the doctrine of laches, and the Supreme Court overruled him.

The defendant, according to its answer, knew at the time it purchased that the grant required the Wagon Road Company to sell in quantities not exceeding 160 acres to one person and at prices not to exceed $2.50 an acre; that the Wagon Road Company had violated this provision by selling to Miller the 35,533.59 acres and to Besse the 61,143.37 acres. It knew, too, that the Wagon Road Company had broken faith with the Government, dishonestly repudiated its contract, and refused to carry out its agreement, that it would hold the lands upon the "conditions and limitations"

imposed by the grant. Notwithstanding this knowledge, the defendant took the title and paid the purchase price. If "A" purchases property from "C," with full knowledge that it has been stolen from "B," will he be heard to say in a court of equity, when "B" seeks to recover, that before "B" can have a judgment, he must pay him back the money which he paid to "C" for the property? "B" could answer, as the Government answers here, "I did not receive the money which you ask me to pay; you may be entitled to recover it from the man that stole *my* property, but you have no right, either in a court of equity or of law, to exact it from me."

"Dishonest" Government

Appellant complains of the "dishonesty" of the government because, forsooth, it did not act as a guardian for Crapo, an "ex-member of congress" and "leading lawyer;" for Rotch, the "distinguished civil engineer and railroad builder;" for Besse, the "experienced sea captain;" for Elijah Smith, the "Harriman of the west." But was it under any legal or ethical obligation to do so? It had placed its will upon the statute books of the nation, where any one who desired might read. If the gentlemen just mentioned, and who formed the defendant company, refused to read where they might have found the truth, or contemptuously ignored the land laws on the premise that "they are all doing it," the fault was theirs, not the government's.

The long disregard for the law embodied in the restrictive proviso by the appellant is offered by it as a reason why it should not be called to account at this

time for its dereliction. Sometimes the fact that the offender had not previously fallen into sin has been urged in mitigation of the first offense, but not until now had we ever heard of a delinquent pleading the long duration of "his offending" as a reason why the law should not visit upon him the just consequences of his fault. Hard cases make not only bad law but desperate arguments.

The Lower Court Gave to the Appellant Much More Than It Was Entitled To

Strictly speaking, the appellant has no title to the land involved in this suit. It was acquired in violation of law, and of course the law cannot approve a title thus procured. The decision, we respectfully submit, should have been that appellant never obtained any title. This would have left the title in the Coos Bay Wagon Road Company.

There is nothing in the Oregon & California case opposed to this. It is authority for holding that the Coos Bay Wagon Road Company, if existing, would be entitled to the "full value" which the grants conferred up it, namely, $2.50 an acre, but it is not authority for saying that the appellant has any title to the land. It holds the contrary in deciding that the law —the grants—forbade a transfer of the land except in conformity with the restrictive covenant. The government, however, does not now insist upon this.

(b) Alleged Opinion of Eminent Counsel.

Not a particle of competent testimony appears in the record to sustain the claim of the answer that the

purchase was made on the opinion of "eminent counsel." If this was so, why was not the opinion produced? No one testifies to having seen or read such an opinion. True, Crapo says that Besse, who was a sea captain, told him that the title had been examined by a professional man in Portland, who declared the title to be valid in the grantor, but he never saw the opinion (B. F. 97). Mr. Rotch says he got the notion that the title was good, because it had been examined by lawyers, but he could not recall who did the examining, or that he had ever read or heard read the opinion of any lawyer upon the subject.

Mr. Charles R. Smith, president of the defendant company, testified that Elijah Smith, former president of that company, had told him that he (Elijah) had the opinion of a Pittsburg attorney concerning the title, but did not produce it. Nor has such an opinion been found (B. F. 100).

This is all in support of the statement that the title was purchased upon the opinion of "eminent counsel." It fails, of course, to sustain the claim. And even if the claim was established, it would avail nothing. The defendant cannot justify its purchase of a defective title, with full knowledge of its infirmities, by showing that it was advised by a lawyer that the title was good. The true owner of the property is not responsible for the unsound opinion; to deprive the Government of its property because of an act which it did not cause, would be the height of inequity.

Judge Brewer, speaking for the court in the United States v. Cal. & Ore. Land Co., 148 U. S. 31, 41, said:

A court of equity can act only on the conscience of a party; if he has done nothing that taints it, no demand can attach upon it, so as to give any jurisdiction.

(c) Mr. Mallory's Opinion.

The firm of Dolph, Mallory, Simon & Gearin, or the part then existing, was the legal adviser of the Oregon Southern Improvement Company from the beginning, and has occupied the same relation to the defendant company from its incorporation down to the present day. Mr. Mallory, a member of Congress when the granting act passed, and, as we have shown *supra,* thoroughly familiar with the purpose of Congress in placing the restrictive proviso in the act, became a member of this firm in 1883. Surely he did not advise the defendant company, or the Oregon Southern Improvement Company, that the restrictive proviso was not applicable. His knowledge was the knowledge of his client (The Distilled Spirits, 11 Wall. 356, 357; Stanley v. Schwalby, 162 U. S. 225).

(d) Opinion That Title Was Defective.

Those to whom Mr. Kinney had agreed to sell, found no great difficulty in discovering that the title was not sound (B. F. 84, 86).

(e) Defendant's Claim That it Believed the Title to be Valid.

The defendant alleges that it purchased believing that each of its grantors "had the unconditional fee simple title" (Ans. 38). In making out the defense of

innocent purchaser the defendant must show more than a mere belief, no matter how firm, that it was getting a good title. Unless it can prove that it did not have either actual or constructive knowledge of the facts which shows a bad title, it cannot succeed. Defendant seems to be in the situation of a man who admits that he knew the gun was loaded, but did not believe that it would hurt a person if discharged into his body. Having admitted the facts defendant is charged, incontestibly, with knowledge of the consequences attached to them by the law.

But did it actually believe it had an unconditional fee simple title? If so why did it refuse to give warranty deeds? (B. F. 83).

In 1888 Elijah Smith told Mr. Siglin that his company was an innocent purchaser and not, therefore, bound by the terms of the grant (B. F. 38). At that early day he knew the title had flaws, but he hoped to shield himself and his company by the defense of *bona fide* purchaser.

Look, too, at the transactions through which the Oregon Southern Improvement Company acquired title. On December 20, 1883, Crocker conveyed to Besse; nine days afterwards, or on the 29th of December, Besse conveyed the same land to Gray; six days afterwards, or on January 5, Gray conveyed to the Oregon Southern Improvement Company; two days afterwards, or on January 7, the Wagon Road Company conveyed the 61,143.37 acres to Besse; and five months afterwards (or according to the amended answer, three days before) Besse conveyed the same land to the Oregon Southern

Improvement Company, and on Janary 1, 1884 (still three days before), the Oregon Southern Improvement Company mortgaged the lands then owned by it or thereafter to be acquired, to the Boston Safe Deposit & Trust Company (B. F. 32). Why these transactions within a few days of each other, if not for the purpose of covering something—of preparing the defense of *bona fide* purchaser? There is no other reasonable explanation. It shows a consciousness of wrongdoing.

Consider, too, the transfer from the Oregon Southern Improvement Company to the Southern Oregon Company. According to the testimony of Rotch, assistant treasurer, a man well acquainted with the matter, and now having no direct interest in the suit, the stockholders and bondholders of the Oregon Southern Improvement Company were identical (B. F. 79). The bondholders, then, controlled the company. There was no occasion for foreclosing the trust deed in order that control of the property might be obtained by them, for they had that control already. Yet, it was foreclosed and the property bought in by the Southern Oregon Company, formed and controlled by the same men who controlled the Oregon Southern Improvement Company (B. F. 79 *et seq.*).

Was not this for the same purpose as the many conveyances?

(1) *Another Reason Why Defendant Did Not Believe the Title Good.*

Witnesses called by the complainant and by the defendant alike, testified that the terms of the grant

were a matter of common knowledge in Empire, Marshfield, and among the settlers along the line of the road; that a person could not go amongst the people without ascertaining the terms of the restrictive proviso. Mr. Loggie, one time manager of the company, said: "Mr. Hazzard and myself have talked of the conditions many times, there was nothing secret about it. It was generally known that that was a condition in the grant from the United States Government to the State of Oregon, that it not only said 160 acres to settlers or actual settlers, but not more than $2.50 an acre" (B. F. 37).

If this was generally talked about and believed in the community, the defendant must have known it. How could the defendant be in darkness when there was light everywhere?

(2) *Theory on Which Defendant Purchased.*

Why, it may be asked, did the defendant take the title notwithstanding its patent infirmities? At the time of this purchase, and for many years before and after, little attention was paid in Oregon, or for that matter in any other part of the west, to the law governing land grants. Men took upon themselves the responsibility of ignoring the laws of the United States, that they might profit thereby. Whether the officers of the defendant acted upon that theory, we do not know, but their conduct would *indicate* that they did.

(f) Cost of Wagon Road.

Is there anything else in the situation which creates an equity in favor of the defendant, or of any

of its predecessors in title subsequent to the State of Oregon?

The road was about 65 miles long; some 20 miles of it, extending from Roseburg west, had been constructed in early days and it cost the company very little to conform it to the specification of the new road B. F. 88). There was, therefore, but 45 miles which required new construction, and considerable of this runs through valleys where practically no grading was necessary. A number of witnesses familiar with the road, some having helped to build it, and all having knowledge of the cost of road construction in that part of Oregon, testified upon the subject. Some give the cost as to one part and some as to another. Only two testified with respect to the whole road, Harry and Murray. The former said he had traveled over the road many times, and had been supervisor of road construction over the mountains for 21 years. He placed the cost at $500 per mile, while Murray placed it at from $500 to $700 a mile. Murray was, however, a mere workman and had no experience in contracting. Harry had much experience, and was thoughly qualified to speak upon the subject. Some of the others place the cost of the parts with which they were familiar, at less than $500 per mile, and some at more. But we believe Harry's testimony to be about right. Assuming this to be true, the road—65 miles—cost $33,500. The Wagon Road Company sold the road to Miller for $37,200, and received in addition about $17,000 for the 6,963 acres sold prior to May 31, 1875. From the total of these two items, deduct the cost of the road, $33,500, and there will be $20,700 left. If we add to this, the $35,534 received from Miller, and the $91,715.05 received from

Besse (B. F. 13), we have a total of $147,949.05, which the Wagon Road Company reaped from the transaction. The profit realized by the Wagon Road Company was considerable, and shows conclusively that there is no equity on this score in favor of that company, and that none could have devolved upon the defendant from that source.

(g) Alleged Advantages of the Road to the Public.

It is alleged that the distance which the property, the troops, and the mails of the United States had to be carried, was reduced many hundred miles by the construction of the road (B. F. 88).

This finds no support in the testimony. Loggie, Siglin, Weekly, Harlocker, Stevenson and Mast, testified that they never saw United States troops on the road, although they were familiar with it from the beginning down to the present time. There is no testimony from anybody, that the road was ever used by troops.

The delivery of the mail was not much facilitated during the summer months, and not at all during the winter months. Before the road was completed, the mail was brought over once a week by pack horse, and after completion, was carried in the same way during the winter months, and they were many. Harlocker, Murray, Miller, Krantz, Hall and Norris testified to this effect (B. F. 88).

The road, then, did not bring any particular advantages, in the way of transportation, to the people of the vicinity.

(h) Toll Collected.

For a long time the company collected toll, and a very good toll, for the services rendered, so Buell, Harry and Laird testified (B. F. 89).

(i) Alleged Expenses on Account of the Land.

Hockett, bookkeeper of the defendant company, presented a table showing receipts $124,281.92 and expenditures $815,978.44, making a debit balance of $691,696.52 (B. F. 90). This is valueless, for he was unable to state how much of the alleged expenses were on account of wagon road lands and how much on account of the Luse lands. He guessed, but that was all (B. F. 90). We know the account is inaccurate because it does not include the $65,000 received from Kinney (B. F. 92).

Consider the item of $218,207.83, general expenses. How could that sum of money have been expended on account of a tract of wild land upon which the company had not made directly a dollar's worth of improvements? The interest item of $218,829.49, shows that a large sum was borrowed on account of this land. Perhaps it is the interest upon the balance of the purchase price, but in any event it shows the land has been used by the company as the basis of a large credit, hence, it has been of great value to the company.

But there is another view of this matter. The smallness of the receipts is due to the unwillingness of the company to sell. It has refused to sell because it believed it would reap a greater reward by holding the

land for higher prices. That the land has increased in value is shown by the testimony.

Cruises of the land in Coos County were made by official cruisers of the county. Their fairness and competency are vouched for by the defendant, for it called them to the witness stand (B. F. 70). The cruise of Douglas County was made by Mr. Guthro, an employe of the defendant, after the suit was instituted (B. F. 70). The result of the cruises in both counties appear in the following table:

DOUGLAS COUNTY.

Grazing	11,934 acres
Sheep range	832 "
Cultivation	1,122 "
Part cultivation	975 "
Not classified	1,760 "
Total	16,623 acres
Cruised not in bill	120 acres
In bill not cruised	1,760 "
Timber	293,416,000 feet

COOS COUNTY.

Grazing	27,860 acres
Part grazing	5,780 "
Cultivation	14,980 "
Part cultivation	12,330 "
Agricultural	1,320 "
Part agricultural	200 "
No value	3,120 "
Little value	4,280 "
Total	69,870 acres
In bill not cruised	4,660 "
Total	74,530 acres
Timber	2,065,665,000 feet
Total cruised in bill (Douglas)	16,623 acres
Total cruised in bill (Coos)	69,870 "
Total	86,493 acres
Not cruised in bill	6,430 "
Total	92,923 acres
Total timber	2,359,081,000 feet

It is said this timber is very valuable. Assuming that it is worth $1.00 per thousand, it would amount to $2,359,081. To this must be added the value of the land, which would equal at least $500,000 more, making a total of $2,859,081; deduct from this the debit balance of $691,696.52 and there will be a net balance of $2,167,384.48.

What caused this increase in value? Not anything done by the company, for the testimony is overwhelming that its conduct has retarded the development of the locality (infra). It is due entirely to the enterprise and labor of the other members of the community. If the company has lost by waiting to realize a value produced by others, and to which it contributed nothing, that loss forms no basis for an appeal to equity.

(j) Injurious Effect of the Policy Pursued.

Many witnesses testified that the policy of the Wagon Road Company and its successors in title, including the defendant, in refusing to make sales of the lands had a paralyzing effect upon the development of southwestern Oregon. Messrs. Siglin, Weekly, Harlocker, Bettis and Loggie gave testimony to that effect. Mr. Loggie, former general manager, said that the policy of the Oregon Southern Improvement Company and the Southern Oregon Company, in reference to making sales within the terms of the restrictive proviso "retarded the development of the county, as their property covered a large part of the county, and that on general principles adherence to that kind of

policy would retard the growth of any place" (B. F. 93). Can it be that such a course of conduct entitles the actor to the special consideration of a court of equity?

(k) Knowledge of Present Owners.

Mr. Charles R. Smith and his relatives have become the owners of four-fifths of the entire issue of the capital stock of the company. Mr. Smith's first purchase was made in May and his last in October, 1910, more than two years after Congress had authorized the institution of this suit. A long time before his purchase he talked with Mr. Elijah Smith about the title, and learned from him that there was a flaw in it. True, Mr. Elijah Smith said he had the opinion of a Pittsburg lawyer to the effect that the title was good. But he also said that he was going to ask the Attorney General of the United States to bring suit with respect to the title. The opinion of the Pittsburg lawyer, Mr. C. R. Smith never saw (B. F. 86). The slightest inquiry would have revealed to him that in 1902, eight years before, when Kinney attempted to purchase, the title had been rejected because of its defects. Anyhow, Mr. Smith and his relates—Mr. Smith was acting for them—acquired the present holdings with full knowledge that the title was in question. The Government did nothing to allure them into this. On the contrary, it had some years before, by the joint resolution of April 30, 1908, instructed the Attorney General to bring suit with respect to the lands. No, Mr. Smith and his friends bought into a law suit; they took their chances, and have no just ground for asking equity to relieve them from their legal obligations.

Defendant submits two authorities in support of its argument upon this point. (Brent v. Washington Bank, 10 Pet. 596; U. S. v. Arrendondo (6 Pet. 691).

In the first case there was a legal bar to the relief which the United States sought, and the court held that the removal of the bar would be conditioned on the government doing equity. No question of the enforcement of a statute was involved.

The second case (United States v. Arrendondo) was cited by the defendants in the Oregon and California case without avail. There is nothing in it which supports the defendant. It is an exceptional case. The plaintiff claimed certain lands in Florida, under a grant made to him by the Spanish Government before the United States had acquired title to Florida by the treaty with Spain. The government denied the validity of the plaintiff's title. An act of Congress was passed authorizing the federal courts to determine the controversy. Fourteen pages of the opinion are devoted to a review of the rules laid down by Congress for the decision of the case. It is observed by the court that the performance of the condition subsequent appearing in the grant was *prevented* by the act of Spain, the *grantor,* in ceding the lands to the United States, and therefore, that it would be inequitable to strictly enforce the condition. The conclusion of the court is that "the title of the claimant is valid according to the stipulation of the treaty of 1812, the laws of nations, of the United States, and of Spain (p. 749).

In a part of the opinion it is said that if the grantee could not strictly perform the condition subse-

quent because of the act of the grantor, he might "do it *cy pres* * * * and save himself from the forfeiture" (p. 744). How could the application of that doctrine help defendant? There is no showing that the defendant, or any of its predecessors in title subsequent to the State, has performed the condition *cy pres,* or at all; nor that it has even attempted to do so.

The present attitude of the defendant is that of law defiance. It does not offer to comply with the terms of the grant. If it did there might be more force in its petition to the conscience of a chancellor.

The principle of *cy pres* cannot serve the defendant; what it needs is a rule of decision which will authorize it to totally ignore the law.

Supreme Court Decision

Again we go to the decision of the Supreme Court in the Oregon & California case, which, in our judgment, disposes of every question in this case. The court speaking of the failure of the defendants in that case to earlier raise certain questions with respect to the applicability of the restrictive provisos in the grants before the court said:

> Had there been an assertion of rights against the act of 1869, and had there been an immediate rejection of its provisions and obligations, the question in the present case would not now be submitted for solution. It is possible to suppose that no patents to lands would have been issued, or, at any rate, the government's attention would have been challenged to the assertion of rights which it might have contested from a position of supreme advantage (p. 921).

Very pertinent here. If the defendants, instead of relying upon the assumption that the Government would not enforce one of its own laws, brought an action to test the meaning of the restrictive covenant, which could have easily been arranged, they would have no occasion to find fault at this time with the failure of the government to act more promptly.

The case of Nichols v. Southern Oregon Co., 135 Fed. 232, settled one question respecting this grant, and another suit could have been brought by private parties to settle the questions debated in the instant case.

XII.

THE DEFENDANT URGES THAT LIMITATIONS ON THE RIGHT OF SALE CANNOT BE ENFORCED WHERE THE GRANT IS TO THE STATE.

A number of decisions have been brought to the court's attention by the defendant in support of the above statement (Seymour v. Saunders, 3 Dillon 437-443; Wilcox v. McConnell, 13 Pet. 496-516; Camp v. Smith, 2 Minn. pp. 131, 143, 144; Dunklin County v. Dist. Co. Court, 23 Miss. Rep. 449-456; Mills County v. R. R. Co., 107 U. S. 557, 566; Hagar v. Reclamation Dist., 111 U. S. 701, 702; Emigrant Co. v. County of Adams, 100 U. S. 61, 69; Cook Co. v. C. C. Canal, etc., 138 U. S. 633, 655, McNee v. Donahue, 152 U. S. 587, 602; U. S. v. Des Moines, etc. Co., 142 U. S. 510, 541; Chandler v. C. & H. Min. Co., 36 Fed. 665, 667; U. S. v. Louisiana, 127 U. S. 182, 187).

We have read them all. Most of them are devoted to a construction of the swamp land acts, or acts of similar import.

The case of Mills County v. R. R. Co. is characteristic; in that case lands were granted to the State of Iowa, and it was authorized to sell them and apply the proceeds to the reclamation of certain lands, if necessary. The State sold the lands to the railroad company. Mills County commenced action against the railroad company on the ground that the State had not applied the proceeds in accordance with the terms of the act, and, therefore, the railroad company's title had failed. This the court denied. It held, in effect, that the State had sold the lands in strict conformity with the grant; that the railroad company had acquired a good title, and that the failure of the State, if it did fail, to apply the proceeds properly could not affect the Railroad Company's title. That does not illustrate any question in this case. The sales here were not in conformity with the grant, but in disregard of its terms.

Camp v. Smith, *supra,* is the only case out of the number which even squints at the proposition stated by defendant. It says:

> The federal government may regulate the terms on which it will give lands to the citizens, fix the prices for which it shall be sold, and give preference to certain purchasers, but when the terms of the gift are complied with, or the purchase money paid, the gift or purchase is complete (p. 143).

That case sustains everything for which we contend, namely, that the "government may regulate the terms on which it will give land to the citizens," and "fix the

prices for which it shall be sold." The power of the government over the lands, until the terms of the government have been complied with, is not denied. If the terms of the government had been complied with here, this suit would nver have been instituted.

CONCLUSION.

The government gave its lands on terms so plain that to even doubt the meaning seems a travesty on common sense. The grantee accepted them on these terms, obeyed enough to secure patents, and then cast the others to the winds. With full knowledge of all this the defendant purchased. It was not necessary that defendant should have invested its money for the purpose of protecting a right or discharging an obligation. Its action was purely voluntary. The failure of the government to bring suit was not ground for such a course. Repeated decisions of the Supreme Court make it clear that laches are not imputable to the government, and that executive officers, unless specially authorized by Congress have no power to waive the enforcement of a law. And, therefore, it was abvious that the failure of such officers to act with respect to the grant under consideration, was no evidence that the government had waived the covenant or acquiesced in its breach. Defendant's action in purchasing under the circumstances was supreme folly. It must have reasoned on the hypothesis that the government would ignore its own laws, and refrain from claiming what belonged to it. No one has a right to proceed on such a belief. But if he does, he must accept the consequences.

Obedience to the will of Congress is essential. Equity has no reward for the defendant who flouts the law.

The decree below was right and should be affirmed.

Respectfully submitted,

CONSTANTINE J. SMYTH,

Special Assistant to the Attorney General.

TABLE OF CASES CITED.

For the convenience of the court, the authorities hereinbefore cited, quoted or discussed have been tabulated, with appropriate reference to the pages of the argument, and the table is hereto appended.